Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

FRANK E. VENNES, JR.,

Petitioner,

vs.

AN UNKNOWN NUMBER OF UNIDENTIFIED AGENTS OF THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

If Agents of the Federal Government commit torts of assault, extortion and intentional infliction of emotional harm upon a citizen in order to get him to commit a crime, is the citizen/victim estopped from bringing a civil tort action for damages because he pled guilty to the crimes the agents caused him to commit?

PARTIES TO THE PROCEEDING

The parties to these proceedings include an unknown number of unidentified agents of the United States of America.

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OFFICIAL REPORTS OF OPINIONS RELEVANT TO THIS PETITION

a. Original decision of Honorable United States Federal District Judge Patrick A. Conmy, District of North Dakota, dated January 13, 1993 (Unreported).

b. Original decision of the United States Court of Appeals for the 8th Circuit, dated December 17, 1993. Reported at 26 F.3d 1448.

c. Order in response to Petition for Rehearing en banc of the United States Court of Appeals for the 8th Circuit, dated August 10, 1994.

JURISDICTIONAL GROUNDS

The Jurisdiction of the United States Supreme Court is provided by 28 USC 1254 and Rule 12 of U.S. S.Ct.

a. The Judgment of the 8th Circuit Court of Appeals for which this review is requested is dated June 16, 1994.

b. The Order of the 8th Circuit Court of Appeals denying rehearing en banc is dated August 10, 1994.

c. The statute conferring jurisdiction upon the United States Supreme Court to review the decision of the 8th Circuit Court of Appeals in this case is 28 USC 1254.

THE CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE INCLUDE

a. Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

b. Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

c. Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

d. Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

In mid-year of 1985 Agents of the Federal Government suspected that a number of Western North Dakota automobile dealers were engaging in illegal drug trafficking. The Agents devised a plan to enlist the assistance of an unsuspecting private citizen to infiltrate the suspected drug rings in order to obtain information on money laundering that might lead to indictments.

The Agents settled on one Frank Vennes as their man. Vennes had never committed a crime and was a law-abiding family man. He recently had been the victim of a crime himself in which $95,000 he had obtained from the sale of a business was embezzled from him. When the Federal Agents first approached Vennes, they held themselves out to be businessmen, from out of state, who were looking for a young, ambitious businessman located in Western North Dakota. Given the loss he had just suffered personally, he was vulnerable.

The Federal Agents pursued Vennes over a number of months with many entreaties and solicitations that he become involved with them. Of the 111 taped telephone conversations later disclosed by the Government pursuant to Freedom of Information demands, more than 100 were initiated by the Federal Agents. Eventually Vennes agreed to travel to Switzerland with $100,000 cash provided to him by the Federal Agents. He was to be paid for doing this. At their direction he did so without complying with United States Custom reporting laws. There exists *no evidence* Mr. Vennes had *any* predisposition to commit this crime.

This first consignment of money was shortly recalled by the Agents. Vennes was able to have it returned to them immediately. Again there was no compliance with United States Custom reporting laws. The Agents then again provided $100,000 cash to Vennes with a request he deposit it into a Swiss bank account. Vennes again traveled to Switzerland and made arrangements for the deposit. Again there was no compliance with reporting laws. This time, however, the persons with whom the money was entrusted in Switzerland "borrowed" it for a few days and were subsequently unable to repay it. When Vennes returned to advise the Agents the $100,000 had been misappropriated, the Agents were in deep professional trouble themselves. They told Vennes that indeed they were not the out-of-state businessmen they had held themselves out to be, but instead were aligned with the Chicago mafia. Vennes was advised that unless he somehow came up with the money, he and his wife and children would be dismembered and killed.

Vennes had no means for recouping this large amount of money in the time allotted to him. The Agents suggested and assisted in planning the commission of a series of crimes that hopefully would yield the funds necessary to recoup the $100,000. The crimes suggested by the Agents included drug activity and illegal gun sales. The crimes proved to be unsuccessful as a fund-raising program. Threats of death and dismemberment continued over the course of the following two years, and Vennes continued to work with his mafia tormentors in attempting to recoup the $100,000 through additional criminal activity. The Agents suggested [illegible]es of crimes to him and assisted in the arrangement of times, places and

people, where successful criminal activity might generate the money needed to replace the Agent-lost funds.

Eventually the consequence to the Agents of having lost $100,000 of government funds in a botched sting could not be avoided. Someone in the government determined a necessary response to this loss included the need to indict and destroy Frank Vennes. He was indicted and arrested for money laundering, drug activity, illegal gun sales and conspiracy. In addition, he was served with an I.R.S. tax levy alleging he owed $250,000 in back taxes related to all of this criminal activity he had been engaged in.

Vennes and his court-appointed lawyer were unaware he was a victim of an elaborate government plot. Vennes thought he had been engaging in criminal activity with members of the mafia. His lawyer did no discovery and under a situation that looked hopeless to defend, worked out a plea bargain for Vennes. It was not until he stood before the United States Federal Judge to enter a plea of guilty that Vennes *might* have realized his victim status. In all likelihood he never would have learned the truth had the presiding Judge not asked the United States Attorney why that office was being so lenient in its plea agreement given the seriousness of the charges. The U.S. Attorney responded:

> During this period of time as I alluded to before, the defendant had lost control of the money over in Europe, the last $100,000. About this time he thought he was dealing with people from the underworld or organized crime out of Chicago.

> And he, what we think could make a fair case, was trying to recoup his losses and as a result he had an offer again through the undercover agent of the sale of firearms because the defendant did have a firearms license. He did sell an automatic weapon. He also sold a pistol that the serial number had been obliterated on, as was charged in the indictment.
>
> Along with that, about the same period of time, in was – there was discussion about the sale of drugs in which Mr. Hanson's case we stated briefly the other day as to what transpired there and there was a lot of conversations between the defendant and Mr. Jovonovich (a government agent) who was posing as a drug dealer and who had control of a large quantity of drugs.
>
> And the defendant through this period of time was attempting to set up a purchase that, but he was never able to raise the money and we also believe contrary to what he said in the conversation he was not able to – did not have a distribution for the drugs.
>
> So as a result of that *we felt that they were all interrelated and it's a question whether or not the defendant on his own would have entered into these if not for the shortage of the $100,000 and that's why we thought this would be a just decision or just result of these as far as acceptance of the plea.* (Emphasis added.)
>
> Transcript of Hearing on Change of Plea, August 10, 1987, Page 10, Line 23 through Page 11, Line 21.

As these words were being spoken, Vennes did not appreciate the significance of what was being said. He was the victim of an incompetent defense and of an emotional

state created by two years of mafia-type terrorism to him and his family. His property and resources with which he might have defended himself had all been confiscated. His wife had left with his children and had divorced him. He was humiliated and frightened.

Upon advice of his lawyer he pled guilty to conspiracy to launder money (that provided to him by the Agents). He also pled *nolo contendre* to illegal firearms transactions (suggested and arranged by the Federal Agents). Finally he pled *no contendre* to use of a telephone for a drug transaction (calls made to persons whose names were provided by the Federal Agents).

He received a five-year sentence to prison which he served. While in prison, Vennes brought a series of Freedom of Information Act *lawsuits* which were aggressively resisted by the Government. In the materials that were ordered by the Courts to be delivered to him, he first learned and understood the information recited herein and the truth of what had happened to him. He also engaged the services of a CPA and challenged the $250,000 tax levy. The end result of that effort was that it was determined he owed *no tax*, and indeed the Federal Government may very well owe him a few thousand dollars to this day.

Upon his release from prison he engaged the services of a lawyer to commence this civil action against the agents for their tortious conduct of assault, extortion and intentional infliction of emotional harm.

Jurisdiction in U. S. District Court was invoked pursuant to the 4th, 5th, 6th, and 8th Amendments to the Constitution of the United States of America, as well as

28 USC 1331; 28 USC 1332 (a)(1); 28 USC 1343(1)(2) and (4); 28 USC 1391 (e)(1) and (2); and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404, 91 S.Ct. 1999 (1971).

The Trial Court granted a government motion for summary judgment holding that (1) Vennes was estopped from making these claims because he had pled guilty to criminal charges involving the facts of this case, and (2) his exclusive remedy as against any I.R.S. agents who may have wronged him was to be found in the Internal Revenue Code.

On appeal the 8th Circuit affirmed the District Court with Judge Heaney in dissent. Upon suggestion for rehearing en banc the petition was denied with four judges indicating they would have granted same.

ARGUMENT IN SUPPORT OF PETITION

The complaint in this action clearly stated a cause of action under the law and in accord with *Bevins, supra.* The action was commenced in reliance of the 8th Circuit Court of Appeals' decision in *Gunderson v. Schlueter,* 904 F.2d 407 (8th Cir. 1990). In *Schlueter,* the 8th Circuit said injury to reputation alone without proof of loss of business or employment would not give rise to a constitutional tort. However, the Court said a series of cases including *Rochin v. California,* 342 U.S. 165; *U.S. v. Russell,* 411 U.S. 423; and *Hampton v. United States,* 425 U.S. 484; establish the due process clause of the U.S. Constitution can be violated even in the absence of a procedural violation by law enforcement authorities who go to far in

manufacturing a crime and in inducing an otherwise law-abiding citizen into committing that crime. The 8th Circuit then warned:

> The level of "outrageousness" needed to prove such a due process violation, however, is quite high. *Gunderson, supra.*

The Court further advised, "The police conduct becomes the proper point of inquiry only in the rare situation where it is too outrageous to be overlooked." *Gunderson, supra.* The Court noted there had never been a case brought before them where a plaintiff had successfully established a sufficient level of outrageousness, but that the case when such proof would be successful would be one where the government agents themselves actually conceived and initiated the crime and the defendant merely fell into place with carrying out the government's scheme. The plaintiff in *Gunderson* was said to have fallen short of this proof requirement because, *"THE OFFICERS DID NOT APPLY ANY EXTRA-ORDINARY PRESSURE ON GUNDERSON TO CONVINCE HIM TO JOIN THEIR SCHEME."* (Emphasis added.)

The proof in Frank Vennes' case exactly meets the requirements of proof outlined by the 8th Circuit in *Gunderson.* Threat of death and dismemberment of an entire family has to meet this burden. The case was summarily dismissed by the District Court, however, and affirmed by the Appellate Court upon a claim that Vennes' plea of guilty to the crimes he committed under duress somehow deny him access to the Civil Courtroom for a redress of his grievances.

The point has been missed, or overlooked, or ignored that this is a civil action founded in tort against individual agents of the Federal Government for their outrageous assault, extortions and intentional inflictions of emotional harm. It is not a belated challenge to the criminal charges. There should be *no* connection between the two. The criminal aspects of this case are long over and irreversibly concluded.

But Vennes' right to use the Civil Courtroom for a redress of the tortious conduct committed against him should not be estopped because of the unfortunate failure to properly defend against the criminal charges that were brought against him. If a police officer cuts off the leg of the bank robber he has nabbed, red handed, the robber's subsequent plea of guilty should not vitiate the tort or the right to damages against the officer for the tort committed.

In *Allen v. McCurry,* 449 U.S. 89 (1980), the U.S. Supreme Court said, "Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court". Certainly as Vennes stood before the Federal Judge to be sentenced and when he *might* have understood for the first time that he was the victim of entrapment and duress, the issue was not before the Court of how much money a number of Federal Agents owed him for terrorizing him and his family for two years with threats of dismemberment and death. In fact, those agents were not ever before the Court.

Estoppel requires mutuality of parties. The United States of America is not a party to this action. It can hardly be said Vennes was given a full and fair opportunity at his sentencing to waive his right to bring a civil lawsuit against Federal Agents for terrorizing him and his family for the previous two years.

The Trial Court in this case found that any remedy Vennes might have had against the I.R.S. agents who assisted in these tortious actions would have to be found in the pages of the Internal Revenue Code. As we told the Trial Court and 8th Circuit, we have searched that Code in vain for some statutory, administrative or case law process whereby one may collect money damages against an I.R.S. agent for threatening a citizen and his family with dismemberment and death. We can find nothing.

CONCLUSION

All Frank Vennes has asked for is a jury trial in civil court to request money damages from a number of agents of the Federal Government who held him and his family in a state of terror over an extended two-year period. The 8th Circuit has set down requirements for bringing suit against federal agents for outrageous conduct but has denied to *this* citizen access to the Court and to a jury to establish his entitlement under those announced requirements.

It is too late to do anything about the great injustice that was inflicted upon Vennes by an entrapment that was not defended, investigated, discovered or utilized to defeat the criminal charges that were brought against

him. But it is not too late to give him his day in court for having been tortiously assaulted, extorted and intentionally inflicted with emotional harm.

Respectfully submitted this 12th day of September, 1994.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1737

Frank E. Vennes, Jr., Plaintiff - appellant, v. An Unknown Number of Unidentified Agents of the United States of America, Defendants - Appellees.	* * * * * * * * *	Appeal from the United States District Court for the District of North Dakota

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Submitted: December 17, 1993

Filed: June 16, 1994

Before LOKEN, Circuit Judge, HEANEY, Senior Circuit Judge, and HANSEN, Circuit Judge.

LOKEN, Circuit Judge.

After pleading guilty and nolo contendere to money laundering, firearm, and drug offenses and serving a lengthy prison sentence, Frank E. Vennes, Jr., commenced this action against unnamed federal agents seeking damages in excess of $10,000,000 under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Vennes alleged that the agents had conspired to violate his rights under the Fourth, Fifth, Sixth, and

Eighth Amendments by coercing and entrapping him into committing the charged crimes, thereby causing "an illegal indictment" to issue, and by seizing his business through an unlawful Internal Revenue Service ("IRS") jeopardy assessment. The district court[1] dismissed Vennes's claims against the IRS agents, concluding that his remedies under the Internal Revenue Code preclude this type of Bivens action. The court granted summary judgment in favor of the remaining defendants on the ground that Vennes "has had his day in court, and on that day entered pleas of guilty or nolo contendere to the charges arising in part from the allegedly coerced activity." Vennes appeals. We affirm.

I.

In August 1986, IRS agents investigating suspected money laundering by certain North Dakota car dealers were told that Vennes, a Bismarck pawnshop owner, had made numerous trips to Switzerland and might have experience in transferring funds to a foreign country. An undercover agent, posing as a Chicago investor, contacted Vennes and asked for help in transferring cash abroad. Vennes later admitted that in the next three months he and his codefendants received $370,000 from the undercover agent and transferred it, minus their substantial commissions, to the Bahamas, the Isle of Man, and Switzerland without complying with federal currency transaction reporting laws. In the last transaction,

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[1] The HONORABLE PATRICK A. CONMY, United States District Judge for the District of North Dakota.

Vennes personally delivered $100,000 to Switzerland, where his associates lost or stole it.

In May 1987, Vennes was charged in three indictments with numerous money laundering, firearm, and drug offenses. Acting on the advice of his attorney, whom he now accuses of ineffective assistance, Vennes entered into a plea agreement under which he pleaded guilty to one count of the money laundering indictment, and also pleaded nolo contendere to one count of illegally selling a firearm in violation of 18 U.S.C. § 922(b)(3) and to an information charging that he used a telephone to facilitate distribution of cocaine in violation of 21 U.S.C. § 843(b).

At the change-of-plea hearing, the district court specifically questioned Vennes and counsel about the unusual nolo contendere pleas. Defense counsel explained that Vennes was "prepared to defend himself on the basis of entrapment [and] outrageous government conduct" but wished to plead no contest because those defenses are "extremely difficult" to prove. The Assistant United States Attorney responded that the government had not insisted on a plea of guilty because Vennes "could make a fair case" that he entered into the illegal firearm and drug transactions in an attempt to recoup $100,000 for the undercover agent, whom Vennes feared was an organized crime figure. The district court accepted these pleas after confirming that they were knowing and voluntary, that Vennes was in fact guilty of the money laundering charge, and that he understood that his nolo pleas would be treated at sentencing as pleas of guilty.

At sentencing, Vennes's attorney stated that the presentence report was complete, fair, and "thoroughly professional." He further stated that he was not "in any way indicating that these government agents acted in an improper fashion," but urged that Vennes be sentenced to only two years in prison because he became "involved in the drugs and the guns" out of fear that he and his family would suffer if he did not recoup the $100,000. After a lengthy hearing, the district court sentenced Vennes to five years in prison, three years for the money laundering offense and one consecutive year for each of the other two offenses.

Vennes did not appeal, but he later sought post-conviction relief under 28 U.S.C. § 2255. His first petition alleged ineffective assistance of counsel because his trial attorney did not seek dismissal of the indictments on the grounds of entrapment and outrageous government conduct. We denied relief, concluding:

> Although Vennes now alleges that counsel was ineffective, he has failed to show any prejudice resulting from counsel's alleged deficiencies. In particular, Vennes does not make any showing that he would have been willing to stand trial on any of the multitudinous charges on which he was indicted. We observe that his plea bargain resulted in the dismissal of many of those charges and in a sentence that is far lighter than the maximum sentence for the crimes to which he pled either guilty or no contest.

Vennes v. United States, No. 88-5057 (8th Cir. Oct. 27, 1988). In a second § 2255 petition, Vennes claimed that the

government breached his plea agreement because information he provided while cooperating with federal investigators found its way into his presentence report, which ultimately affected his eligibility for parole. The district court denied this § 2255 petition after an evidentiary hearing, and we affirmed. *Vennes v. United States*, No. 89-5459 (8th Cir. Aug. 10, 1990).

Following his release from prison, Vennes commenced this *Bivens* action, seeking damages from unnamed[2] agents for entrapment, outrageous conduct, and willful violation of the tax laws. The government appeared and moved to stay discovery – a motion Vennes did not contest – and to dismiss the complaint on grounds of failure to state a claim and qualified immunity. In response, Vennes alleged that he had personally delivered $100,000 to Switzerland for the undercover agent, where this money was lost or stolen. According to Vennes, the undercover agent then advised that he was not a Chicago investor, but a member of the Chicago underworld, and Vennes must recoup this loss or the Mafia would kill him and his family. Prompted by these

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[2] Vennes failed to name or serve *any* agent, even though many of the undercover investigators were named in his indictments or identified elsewhere in the record of his criminal case. On appeal, the government argues that this is a sham *Bivens* action, a disguised claim against the United States that should be barred by sovereign immunity. Vennes's conclusory, overbroad complaint lends considerable credence to this contention. However, it was not raised in the district court, so we do not consider it on appeal.

threats, Vennes agreed to sell firearms illegally to undercover agents of the Bureau of Alcohol, Tobacco and Firearms, and to sell cocaine to undercover agents of the Drug Enforcement Administration. He claims that, as a result of this outrageous government conduct, he was prosecuted and imprisoned and lost his business, his reputation, and, due to a divorce, his family.

The district court granted summary judgment dismissing the claims against the criminal investigators on the ground that those claims were barred by Vennes's pleas of guilty and nolo contendere in his criminal case. The court dismissed the claims against the IRS agents involved in the tax levy on the ground that such Bivens claims are precluded by the remedies provided in the Internal Revenue Code. We review both aspects of the district court's decision *de novo*. *See Concerned Citizens of Neb. v. United States Nuclear Regulatory Comm'n*, 970 F.2d 421, 425 (8th Cir. 1992). The government also argued to the district court, and asserts on appeal, that all defendants are entitled to qualified immunity because they did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The district court did not reach this issue, and neither do we.

II.

The unique issue raised by this appeal is whether the district court erred in granting summary judgment dismissing Vennes's claim that the undercover agent's alleged death threats were outrageous government conduct that violated his due process rights. Vennes clearly

has no procedural due process claim. In response to the three 1987 indictments, he raised the defenses of entrapment and outrageous conduct and then bargained away those defenses, exchanging guilty and nolo contendere pleas for a relatively light sentence. He never moved to withdraw those pleas and did not appeal his conviction or sentence. His § 2255 petition alleged ineffective assistance of counsel and outrageous government conduct; the district court denied that petition on the merits, and we affirmed.

Vennes instead argues that the agent's outrageous conduct violated his right to *substantive* due process, and that this claim survived his guilty plea and unsuccessful § 2255 petition. Vennes relies primarily on our decision in *Gunderson v. Schlueter*, 904 F.2d 407 (8th Cir. 1990). In *Gunderson*, a resort owner acquitted of criminal charges filed a 42 U.S.C. § 1983 due process claim against a state conservation officer who allegedly contrived the criminal case. We affirmed the grant of summary judgment dismissing this claim but observed that, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles [are violated]." 904 F.2d at 410, quoting *United States v. Russell*, 411 U.S. 423, 431-32 (1973).[3] Vennes argues that this is the "some day" foreshadowed in *Gunderson* – if he can prove that "[a]gents of the federal government threatened to kill Frank Vennes and his family if he refused to engage in criminal conduct, so he

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[3] In *Hampton v. United States*, 425 U.S. 484 (1976), a majority of the Supreme Court adhered to the outrageous-conduct due process principle articulated in *Russell*.

did," he will be entitled to damages under *Bivens* and *Gunderson*. Like the district court, we disagree. There are a number of factors that persuade us that Vennes cannot establish a right to relief under *Bivens*.

First, it is significant that Vennes is asserting this due process claim, not in defending the criminal charges that grew out of his dealings with the undercover agents, but in a civil damage action commenced after he pleaded guilty and served a prison sentence for those crimes. A *Bivens* action may be brought on due process grounds. *See Davis v. Passman*, 442 U.S. 228, 245-48 (1979). But courts must always determine that a new type of *Bivens* claim "involves no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396. We conclude there are such special factors here. In *Gunderson*, we rejected the substantive due process claim in part because, "[f]inding a due process violation here would bring us too close to converting every successful entrapment defense into a section 1983 action for damages." 904 F.2d at 411. Vennes of course proposes and even greater conversion, for he did not prove his entrapment and outrageous conduct defenses, he pleaded guilty or no contest to some of the allegedly coerced criminal offenses. Expanding *Bivens* in this fashion would have a chilling effect on law enforcement officers and would flood the federal courts with constitutional damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly.

Second, the government argues that this claim should be collaterally estopped by Vennes's pleas of guilty and nolo contendere. We doubt that these pleas may be given

such sweeping collateral estoppel effect. *See Haring v. Prosise*, 462 U.S. 306, 322 n.11 (1983). However, they are highly relevant to the merits of this due process claim. The alleged deprivation of Vennes's rights occurred during the criminal investigation and resulted in his being charged with multiple crimes. By pleading guilty, Vennes elected to forego the post-deprivation process best suited to determining whether the agents in fact violated his due process rights – the criminal trial. Any procedural due process claims are therefore barred. *See Parratt v. Taylor*, 451 U.S. 527 (1981). Although Vennes claims a substantive due process violation, we have held that, when procedural due process claims under § 1983 are barred by *Parratt*, "claims based on the same actions but alleging denial of substantive due process should be barred as well." *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989). The same principle should apply in a *Bivens* action, the federal law analog to § 1983.

Third, although we have often noted that "outrageous police conduct" may give rise to a substantive due process defense to a criminal prosecution, in no case have we found government conduct sufficiently outrageous to establish this defense.[4] We have recognized that law

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[4] *See United States v. Kummer*, 15 F.3d 1455, 1459-60 (8th Cir. 1994); *United States v. Gleason*, 980 F.2d 1183, 1187 (8th Cir. 1992); *United States v. Huff*, 959 F.2d 731, 734-35 (8th Cir.), *cert. denied*, 113 S. Ct. 162 (1992); *Gunderson*, 904 F.2d at 410 & n.8 (collecting cases); *United States v. Johnson*, 767 F.2d 1259, 1275 (8th Cir. 1985); *United States v. Reifsteck*, 535 F.2d 1030, 1034-35 (8th Cir. 1976). *Compare United States v. Lard*, 734 F.2d 1290, 1296-97 (8th Cir. 1984) (agent's conduct "in conceiving and contriving the crimes" "approached" the boundaries of substantive due process in a criminal prosecution).

enforcement officers "are required to resort to tactics which might be highly offensive in other contexts . . . and agents may go a long way in concert with the individual in question without being deemed to have acted so outrageously as to violate due process." *United States v. Quinn*, 543 F.2d 640, 648 (8th Cir. 1976). Granted, we would not endorse the use of death threats to coerce a defendant to commit charged offenses, but we are properly skeptical of such claims and may reasonably require that the defendant prove allegations of outrageous coercive conduct in the most timely and relevant proceeding, his criminal trial.

Fourth, we find fundamental, insurmountable flaws in Vennes's damage claims. Vennes seeks damages for the time he spent in prison and the indirect consequences of that imprisonment, his divorce and the failure of his business. Yet Vennes was imprisoned because he pleaded guilty or no contest to serious crimes. And three of his five years in prison were attributable to the money laundering offense that was committed before the alleged threats that form the core of his outrageous conduct claims. To the extent that the alleged outrageous government conduct was not the proximate cause of Vennes's injuries, his damage claims must fail as a matter of law.

In these circumstances, we conclude that the district court properly granted summary judgment dismissing Vennes's substantive due process claims. We do not condone undercover agents who pose as dangerous criminals and coerce others to commit crimes. But if Vennes was in fact the victim of such threats, he had many opportunities to seek redress before serving five years in prison for the resulting crimes. He could have complained to state or

federal authorities about the threats; instead, he committed multiple firearm and drug offenses.[5] He could have raised entrapment, coercion, and outrageous conduct defenses at his criminal trial; instead, he pleaded guilty or no contest to three different crimes. He raised the outrageous conduct issue in his first § 2255 petition; that petition was dismissed on the merits. Under our decisions in *Gunderson* and *Weimer*, a post-conviction *Bivens* damage action will not lie.

III.

There remains to be considered the district court's dismissal of Vennes's vague and conclusory tax claims, summarized in his brief on appeal as follows:

> The agents alleged [that Vennes owed] $250,000 in tax liability, instituted a jeopardy assessment, confiscated his business, forced a total asset sale and put him out of business when in fact he owed not a dime.

The district court dismissed these claims on the ground that a taxpayer's remedies under the Internal Revenue Code preclude such a *Bivens* action. Vennes cites us to no contrary authority, and we have found none. Though the Supreme Court has not addressed this precise question, it has strongly suggested that the district court correctly applied *Bivens*:

---

[5] The record reveals that at one point, Vennes purchased cocaine from his own source in Florida after haggling with an undercover agent supplier about price and speed of delivery. This is not the conduct of one coerced or entrapped into crime.

> When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

Schweiker v. Chilicky, 487 U.S. 412, 423 (1988). *See McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988) ("The result [of *Chilicky*] is a sort of presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees."). Since *Chilicky*, at least three circuits have upheld the dismissal of Bivens actions against IRS agents for tax assessment and collection activities. *See McMillen v. United States Dep't of Treasury*, 960 F.2d 187, 190-91 (1st Cir. 1991); *Wages v. Internal Revenue Service*, 915 F.2d 1230, 1235 (9th Cir. 1990), *cert. denied*, 498 U.S. 1096 (1991); *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989). *See also Baddour, Inc. v. United States*, 802 F.2d 801, 808 (5th Cir. 1986); *Cameron v. Internal Revenue Service*, 773 F.2d 126, 129 (7th Cir. 1985). We agree with those decisions.

Congress has provided specific and meaningful remedies for taxpayers who challenge overzealous tax assessment and collection activities. A taxpayer may challenge a jeopardy assessment both administratively and judicially, *see* 26 U.S.C. § 7429, and may sue the government for a tax refund, *see* 26 U.S.C. § 7422. Since November 10, 1988, 26 U.S.C. §§ 7432 and 7433 have authorized taxpayer actions against the United States to recover limited damages resulting from specific types of misconduct by IRS employees. These carefully crafted legislative

remedies confirm that, in the politically sensitive realm of taxation, Congress's refusal to permit unrestricted damage actions by taxpayers has not been inadvertent. See Cameron. 773 F.2d at 129 ("it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against [IRS] employees"). Thus, the district court correctly dismissed Vennes's Bivens claims against IRS agents for their tax assessment and collection activities.

The judgment of the district court is affirmed.

HEANEY, Senior Circuit Judge, concurring and dissenting.

Unable to affirm the district court on the only two issues presented – collateral estoppel and qualified immunity – the court today pieces together a series of rationales why Vennes should not be allowed to continue, labels them "special factors" under *Bivens*, and believes that by so doing the whole will somehow exceed the sum of its parts. There are no "special factors counselling hesitation in the absence of affirmative action by Congress" present in this case that were not present in *Bivens;* the only difference is that Bivens stated a Fourth Amendment claim and Vennes seeks to recover under substantive due process. Rather than reverse the district court and allow Vennes to proceed, as existing law compels, the majority shapes a basis for affirmance out of rationales that are already accounted for under the existing doctrines of qualified immunity and collateral estoppel or that are simply inapplicable and irrelevant. Consequently, I dissent.

If we are to believe the facts alleged and testified to by Vennes – and for purposes of this appeal we must – the defendants engaged in absolutely outrageous behavior. Vennes tells us that IRS agents posing as Chicago businessmen approached Vennes through a business acquaintance and solicited his participation in a scheme to launder money. These businessmen offered Vennes a share of the proceeds if he would launder the "dirty" money through his European connections. At the prompting of these "businessmen," Vennes made two trips to Switzerland to launder money provided to him by the agents. Vennes successfully laundered $100,000 on the first trip, but on the second trip, associates of Vennes made off with the other $100,000. (These "associates" have apparently since been prosecuted for theft.)

When Vennes returned without the money, the Chicago businessmen revealed themselves to be members of the mafia and threatened, *inter alia,* to dismember his children if he failed to recoup this money (perhaps suspecting that their superiors would be none too pleased at the loss of $100,000 of government money). These newly-revealed mobsters then suggested that Vennes engage in illegal drug and firearms transactions in an effort to recoup this money and thereby avoid serious bodily harm to him and his family. Vennes did so, the efforts to recoup the money were unsuccessful, and Vennes was eventually charged with a panoply of crimes. He was given an offer he could not refuse, which caused the district judge who accepted Vennes' guilty plea to question the government's reason for offering such a generous bargain. The government told the court that Vennes "could make a fair case" that he "was trying to recoup" the lost $100,000,

that he believed he was "dealing with people from the underworld or organized crime out of Chicago," and that as a result he engaged in the drug and firearms transactions. App. at 67. "So as a result of that," the assistant U.S. attorney continued, "we felt that they were all interrelated and it's a question whether or not the defendant on his own would have entered into these [crimes] if not for the shortage of the $100,000 and that's why we thought that this would be a just decision or just result of these as far as the acceptance of the plea." *Id.* at 6768.

What the government did not mention at the hearing on the acceptance of the plea, but which was alluded to by the district court in this case, is the embarrassing spectacle that would be created if this case went to trial. *See Vennes v. Unknown Number of Unidentified Agents of the United States of America*, No. A1-9284, slip op. at 1 (D.N.D. Jan. 13, 1993) (hereinafter *Vennes*) ("The court acknowledges that the underlying factual situation . . . is wondrously bizarre. Especially fascinating is speculating about the scene which occurred when the undercover agents tried to explain the loss of the $100,000.00. . . . "). Were Vennes, *Bivens* action to go to trial, or even were discovery to proceed and any of Vennes' claims to be borne out, it is likely that the government would face significant embarrassment. The district court avoided such a possibility when it declared that Vennes is collaterally estopped by his guilty plea from pursuing this claim against the agents. *Vennes, supra*, slip op. at 2. Although this might well be a convenient way to dispose of this case, it is, as the majority notes, foreclosed by the Supreme Court's decision in *Haring v. Prosise*, 462 U.S. 306 (1983). *See supra* slip op. at 7. In that case the Court

specifically noted that both the "prospect of a favorable plea agreement" and "the expectation or hope of a lesser sentence" are valid reasons why a defendant might choose not to pursue possible defenses at trial, *see Haring*, 462 U.S. at 319 (internal quotation marks and citation omitted), but that because an acceptance of a guilty plea involves "no adjudication whatsoever of any issues that may subsequently be the basis of a § 1983 claim," collateral estoppel is "simply inapplicable." *Id.* at 322 n.11. This holding is equally applicable to what the court correctly labels the "analog" to § 1983, the *Bivens* action.

The only other basis for affirmance offered by the defendants is qualified immunity, but it fails as certainly as does the collateral estoppel argument. Although the court chooses not to address this issue, because, it says, the district court did not address it, *see supra* slip op. at 5, the failure of this argument to carry the day can come as no surprise to the defendants. The district court, although not expressly ruling on qualified immunity, stated that even the most zealous law enforcement agent would understand that coercion applied through threats of dismemberment of children is prohibited conduct." *Vennes, supra*, slip op. at 2. Likewise, when defendants, counsel lingered on this issue during oral argument, another member of the panel informed him in no uncertain terms that this court would "not . . . affirm on qualified immunity."

The unavailability of the two argued bases for affirmance leads the court into uncharted territory. Rather than reverse the district court and remand this case for further proceedings, the court gathers together several reasons why, it believes, Vennes' case should not be

allowed to proceed and then labels these reasons (none of which standing alone would suffice as a basis for affirmance) "special factors counselling hesitation" under *Bivens*. That none of these factors has ever before been considered a *Bivens* "special factor" is apparently of no consequence.

The Supreme Court has defined two situations in which a possible *Bivens* action may be defeated:

> The first is when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress. The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

Carlson v. Green, 446 U.S. 14, 18-19 (1980) (internal quotation marks and citations omitted). The second exception is what prevents Vennes from proceeding with a *Bivens* action regarding the tax levy – as discussed in part III of the court's opinion, which I join – but it is the first exception that the majority purports to find applicable to Vennes' claim involving outrageous conduct.

There are few cases delineating the "special factors-"mentioned in *Bivens*, and those cases that do address the issue fall neatly into two categories. The first category includes the military cases, *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983), which hold that *Bivens* actions are not available to those who suffer injury incident to military service, and those cases in which defendants "enjoy such independent status in our constitutional scheme as to suggest that

judicially created remedies against them might be inappropriate." *Carlson*, 446 U.S. at 19; *see Davis v. Passman*, 442 U.S. 228, 246 (1979) (finding that such special factors counsel no greater protection for Congressmen than that provided by the Speech and Debate Clause). The second category involves concerns about "federal fiscal policy." *See Bivens*, 403 U.S. at 396; *see also FDIC v. Meyer*, 127 L.Ed.2d 308, 323 (1994) (refusing to allow *Bivens* action against federal agency, in addition to federal agents, in part because of the "potentially enormous financial burden" such claims would impose on the federal government); *Bush v. Lucas*, 462 U.S. 367, 380 (1983) (finding that, similarly, questions of "federal personnel policy" are best left for Congressional action).

The "factors" put forward by the court in the instant case follow neither of these tracks. Neither of the existing lines of cases supports the court's holding – the defendants are federal law enforcement agents, not military men or Congressmen or anything else; and any financial burden imposed would fall on the agents themselves – leaving the court to invent "special factors" of its own. In all relevant respects, this cause of action against federal agents for violating Vennes' substantive due process rights is identical to Bivens' action for violation of his Fourth Amendment rights.

Furthermore, the "special factors" suggested by the court cannot begin to bear the weight of the court's holding. The first and third factors – essentially that we have never found conduct in this context sufficiently outrageous to state a substantive due process claim and that, were we to do so, it would have a chilling effect on law enforcement officers and flood the courts – are

already provided for by the doctrine of qualified immunity. Taken together, they support allowing Vennes to go forward precisely because the conduct he alleges is so outrageous that it will rarely be duplicated, and, given the existing precedents on substantive due process, virtually every potential defendant will be immune from suit.

The key to this case is that the conduct alleged does go further than any of the previous cases this court has addressed. Unlike the facts in *Gunderson v. Schlueter*, 904 F.2d 407, 411 (8th Cir. 1990), the defendants in this case *did* apply "extraordinary pressure on [Vennes] to convince him to join their scheme." They did not "simply ask[] him to commit the violations"; they threatened that if he did not they would dismember his children. The conduct alleged does "shock the conscience" and it certainly offends my "judicial notions of fairness." *Hall v. Lombardi*, 996 F.2d 954, 958 n.4 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 698 (1994). Such facts are not likely to be repeated with any frequency, but to the extent that they are, plaintiffs are entitled to recover damages.

The fourth factor relied on by the court is the speculative nature of Vennes' claim for damages. The problem with the court's analysis – beyond its utter irrelevance to the question at hand – is that it assume Vennes is only claiming damages for harm that resulted from his incarceration. *See supra* slip op. at 8. As I read Vennes' complaint and briefs, however, he asserts damages that run independently from the two-year period prior to his guilty plea during which he was under constant threat from the defendants to continue committing crimes in an attempt to recoup the lost $100,000. Any reasonable jury

could find harm to Vennes from this conduct independent of Vennes' incarceration, and any argument about the degree of the stated harms caused by his incarceration is best left for trial.

That leaves the court's second argument, suggesting that *Parratt v. Taylor*, 451 U.S. 527 (1981), has some bearing on the validity of Vennes' cause of action. The most that can be said about this argument is that it misunderstands certain dicta from this court's decision in *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989). In that case, the court first dismissed Weimer's substantive due process claim on the ground that "none of our previous recognitions of substantive due process come close to the right asserted by Weimer." *Id.* at 1406. The court thought "it evident that Weimer [sought] to have Amen's conduct declared a violation of due process simply because it violated state law," which the court refused to do. *Id.* The court then went on to state, as an alternative holding, that "[i]n situations where procedural due process claims alleging property deprivation are prohibited by *Parratt*, claims based on the same actions but alleging denial of substantive due process should be barred as well." *Weimer*, 870 F.2d at 1406.

Regardless of the validity of that statement (I have found no subsequent decisions that rely on this rationale in a manner essential to judgment), it has absolutely no applicability to the facts of this case. It might be relevant to Vennes' claim involving the tax levy, but it has no relevance to his claim that he was denied substantive due process by the agents' outrageous conduct. *Parratt* could not bar a procedural due process claim in the latter case because there is no procedural due process claim to be

made, and this court has previously held (prior to *Weimer*) that "*Parratt* does not bar claims based on substantive due process from being brought in federal court" because the "violation of a substantive constitutional right, including substantive due process, is complete irrespective of subsequent procedures accorded to the person whose rights have been violated." *Williams v. City of St. Louis*, 783 F.2d 114, 118 (8th Cir. 1986). Furthermore, any argument that Vennes passed up what process was his due – the opportunity to present an entrapment or outrageous conduct defense at trial – is simply a rehashing of the collateral estoppel argument rejected by *Haring*.

To the extent that any "special factors" are present in this case, they counsel allowing Vennes to go forward. In *Carlson*, the court noted that one reason for allowing plaintiffs a *Bivens* action in addition to an action under the Federal Tort Claims Act (FTCA) is the deterrent effect of such an action for damages: "Because the Bivens remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect, surely particularly so when the individual official faces personal financial liability." 446 U.S. at 21 (footnote and citation omitted). Were Vennes simply to have pursued his entrapment or outrageous conduct defenses, he might well have escaped conviction (at least on the drug and firearms charges), but a successful defense in a criminal trial will have far less deterrent effect on this type of outrageous behavior than will a damages action. Any fear about inhibiting vigorous law enforcement is, as mentioned earlier, rectified by the broad availability of qualified immunity.

To sum up, the court rejects Vennes, substantive due process claim under *Bivens* because of so-called "special factors" – none of which have previously been relied on as "special factors counselling hesitation in the absence of affirmative action by Congress" to defeat a *Bivens* action, and all of which, to the extent they have any merit whatsoever, are already accounted for under the doctrines of qualified immunity and collateral estoppel. The "special factors" analysis is not intended to "concern the merits of the particular remedy that was sought. Rather, [it] relate[s] to the question of who should decide whether such a remedy should be provided." *Bush*, 462 U.S. at 380. On that question, Vennes' claim is indistinguishable from Bivens', and although some may disagree with the judiciary inferring causes of action directly from the Constitution, *see Bivens*, 403 U.S. at 311 (Burger, C.J., dissenting), that battle has long since been fought, and any concern about flooding the courts with frivolous cases, *see id.* at 430 (Blackmun, J., dissenting), has been similarly dealt with. *See id.* at 391 n.4.

In closing, I note one final matter about the court's decision that troubles me greatly. Only two bases appear in the record before us for affirming the summary judgment grant below and thereby thwarting Vennes' efforts to have his day in court. Neither of those two grounds for affirmance, collateral estoppel or qualified immunity, supports the district court's decision. Nonetheless, the court reaches out into the ether to shape a basis for affirmance that neither side has had an opportunity to address. Rejection of Vennes' claim that the defendants violated his substantive due process rights by posing as mobsters and threatening to dismember his children does

him an injustice, but to do so on a novel legal basis, of which Vennes has had no notice, only compounds the error, and from this procedure I dissent as well.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Frank E. Vennes, Jr.

Plaintiff,

-v- A1-92-84

An unknown number of
unidentified agents of
the United States of America,

Defendants.

MEMORANDUM AND ORDER

(Filed Jan. 13, 1993)

The United States of America, apparently acting on behalf of the anonymous and unknown defendants, has moved for dismissal or in the alternative for summary judgment.

The plaintiff entered a plea of guilty to a conspiracy to launder money charge and nolo contendere pleas to a weapons violation and use of a telephone in an attempt to distribute cocaine.

During roughly the same time period, the IRS, claiming a substantial tax liability, filed levies and participated in an auction of defendant's assets. Plaintiff's brief indicates that no liability for taxes did in fact exist after completion of "a competent audit".

The Plaintiff served the prison term to which he was sentenced. During the period of incarceration he challenged the validity of the guilty plea and nolo contendere proceeding, alleging that the conduct of the investigating officers was outrageous and that he was not afforded

effective assistance of counsel. This challenge was not successful.

The court acknowledges that the underlying factual situation as set out in the brief in opposition to the motion is wondrously bizarre. Especially fascinating is speculating about the scene which occurred when the undercover agents tried to explain the loss of the $100,000.00 in currency which they had delivered to the defendant for alleged money laundering services.

The court approaches the problem in two phases. The motion to dismiss is appropriate when applied to the alleged misconduct or negligence of the IRS personnel. The cases are clear that a "Bivens" type claim will not lie against the personnel of the IRS as the tax code provides remedies for relief from such conduct. There is no point in rehashing the case and statutory law on the subject.

The file contains a substantial stack of documents without identification or information regarding filing date. Included therein are the transcripts of the original plea hearing in the criminal case before Judge Benson and the 8th Circuit opinion and mandate affirming the District Court's rejection of the challenge to the pleas entered. It appears that no dispute exists regarding the fact that Mr. Vennes, for whatever reason, did enter pleas of guilty or nolo contendere to criminal charges resulting from the activities of the "unidentified number of unknown agents of the United States of America." Also included in the filed material is a copy of a "debriefing report" which purports to describe the statements of Mr. Vennes confessing to cocaine distribution activities, which, when

included in the presentence report resulted in unfavorable action by the parole commission. The Court would be offended by the inclusion of this report if the information did not also appear in the published 8th Circuit opinion.

Again without replowing the case the statutory law analysis, it appears that the claims against the non-IRS agents must also be dismissed, although as a granting of summary judgment to the government rather than a dismissal for failure to state a claim.

There is no question that the agents were acting in their official capacity as law enforcement officials, and are cloaked with immunity for actions taken in connection therewith, except as might be presented as a "Bivens" action.

The alleged claim that the agents, after the loss of the $100,00.00 in currency by the plaintiff, claimed to be mafia representatives and that the plaintiff and his family members were subject to torture or death unless he cooperated, forcing the plaintiff into other acts of crime involving drugs and weapons may rise to the level of a constitutional tort. One assumes that even the most zealous law enforcement agent would understand that coercion applied through threats of dismemberment of children is prohibited conduct.

Counsel for plaintiff urges that plaintiff be given his "day in court". Plaintiff has had his day in court, and on that day entered pleas of guilty or nolo contendere to the charges arising in part from the allegedly coerced activity.

The court holds that as a matter of law, from the undisputed facts, the plaintiff is not estopped from raising the claims presented in this action.

The motion to dismiss is granted as to the tax levy and activities of the IRS agents. (doc. 9)

The motion for summary judgment is granted as to the balance of the plaintiff's claims. (doc. 9)

Dated this 13th day of January, 1993.

/s/ Pat A. Conmy
Patrick A. Conmy, District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
– SOUTHWESTERN DIVISION

Frank E. Vennes, Jr.

V.

An unknown number of unidentified agents of the United States of the United States of America,

JUDGMENT IN A CIVIL CASE

(Filed Jan. 15, 1993)

CASE NUMBER: A1-92-84

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to Memorandum and Order filed on January 13, 1992; the motion to dismiss is granted as to the tax levy and activities of the IRS agents. The motion for summary judgment is granted as to the balance of the plaintiff's claims.

January 15, 1993
Date

EDWARD J. KLECKER
Clerk

/s/ Donald E. Emineth
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1737NDBI

Frank E. Vennes, Jr. Appellant, v. United States of America, An Unknown Number of Unidentified Agents, Appellees.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian, Judge Wollman, Judge Beam, and Judge Morris Sheppard Arnold would grant the suggestion for rehearing en banc.

The petition for rehearing by the panel is also denied.

August 10, 1994

Ordered Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

(2)

No. 94-461

In the Supreme Court of the United States

OCTOBER TERM, 1994

FRANK E. VENNES, JR., PETITIONER

v.

AN UNKNOWN NUMBER OF UNIDENTIFIED AGENTS OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether petitioner stated a cause of action under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for alleged violations of his substantive due process rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-461

FRANK E. VENNES, JR., PETITIONER

v.

AN UNKNOWN NUMBER OF UNIDENTIFIED AGENTS OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 26 F.3d 1448. The order of the district court (Pet. App. 24-27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1994. A petition for rehearing was denied on August 10, 1994. Pet. App. 29. The petition for a writ of certiorari was filed on September 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In May, 1987, petitioner was charged in three indictments returned in the District of North Dakota with violations of the federal money-laundering, firearm, and drug laws. In August, 1987, petitioner entered into a plea agreement regarding those charges. Petitioner agreed to plead guilty to one count of money laundering and to plead no contest to one count of illegally selling a firearm and one count of using a telephone to facilitate the distribution of cocaine. The government agreed to dismiss the other charges. See Pet. App. 3; C.A. App. 19-20, 57-58, 134-136.

In a hearing on petitioner's pleas, the district court questioned counsel about the no-contest pleas that petitioner had agreed to make to two of the charges. Counsel for petitioner explained that petitioner was "prepared to defend himself on the basis of entrapment [and] outrageous government conduct" but wished to plead no contest because those defenses were "extremely difficult" to prove. Pet. App. 3; C.A. App. 65. The prosecutor explained that the government was not insisting on guilty pleas to the two charges, because petitioner "could make a fair case" that he had committed the underlying offenses in order to recoup $100,000 for an undercover agent [illegible]o petitioner believed was associated with organized crime. Pet. App. 3; C.A. App. 67. The district court accepted petitioner's pleas after finding that they were knowing and voluntary, that petitioner was guilty of money laundering, and that petitioner understood that his no-contest pleas would be treated as guilty pleas at sentencing. Petitioner was sentenced to five years' imprisonment. He did not appeal his conviction or sentence. Pet. App. 3-4; C.A. App. 59-101, 130-138.

2. Petitioner later filed two petitions for relief under 28 U.S.C. 2255. In the first petition, he claimed that his trial attorney provided constitutionally deficient representation because the attorney did not seek dismissal of the charges on the grounds of entrapment and outrageous government conduct. The district court denied that petition. See Pet. App. 4. In affirming the district court's ruling, the Eighth Circuit observed that, contrary to petitioner's claim that his lawyer had not adequately investigated the allegedly improper governmental conduct, "[t]he transcript of the [guilty plea] hearing makes it clear that defense counsel was well aware that his client had a factual basis for asserting outrageous government conduct and entrapment, and that these matters were considered and discussed at the * * * hearing." C.A. App. 335.

In his second petition under 28 U.S.C. 2255, petitioner claimed that the government breached its plea agreement with him by disclosing confidential information to parole officials. Pet. App. 4-5; C.A. App. 337. After "carefully review[ing] the record," the Eighth Circuit affirmed the district court's denial of the petition, holding that "the district court thoroughly and properly examined [petitioner's] claims." C.A. App. 338.

3. a. After completing his sentence, petitioner brought this action against an unspecified number of unnamed federal agents in the United States District Court for the District of North Dakota, seeking money damages under *Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner claimed that the unnamed agents conspired to violate his rights under the Fourth, Fifth, Sixth, and Eighth Amendments. In support of that claim, he alleged that he committed the money-laundering offense to which he later pleaded guilty when he transported

$100,000 in currency to Switzerland without filing the currency reports required by federal law. He alleged that he did this at the behest of undercover federal agents and that they supplied the currency. He also alleged that, after the $100,000 was stolen from him, undercover federal agents posing as mafia figures coerced him into attempting to recoup the $100,000 by committing the firearm and drug offenses to which he later pleaded no contest. Petitioner further alleged that, as part of the claimed conspiracy, agents of the Internal Revenue Service (IRS) made false demands on him, and imposed a levy on his property, for delinquent taxes. Pet. App. 1-2, 5-6; C.A. App. 3-7. The government moved to dismiss the complaint or in the alternative for summary judgment.[1]

The district court dismissed petitioner's claims to the extent that they were based on alleged misconduct by IRS agents. It held that the exclusive remedy for such misconduct was provided by the Internal Revenue Code. It granted summary judgment against petitioner with respect to the remaining claims. It held that he was estopped from asserting those claims because he had pleaded guilty or no contest to the offenses that allegedly

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[1] As the court of appeals noted, petitioner "failed to name or serve *any* agent, even though many of the undercover investigators were named in his indictment or identified elsewhere in the record of his criminal case." Pet. App. 5 n.2. Petitioner served the complaint only upon the U.S. Attorney and the Attorney General, even though the United States was not named as a defendant. See Fed. R. Civ. P. 4(i). The Assistant U.S. Attorney who moved for dismissal or summary judgment and appeared in the district court, purportedly on behalf of the unnamed defendants, was authorized by certain individuals to represent them in the event that they were named as defendants.

arose from the government misconduct on which his claims were based. Pet. App. 26-27.

b. On appeal, petitioner argued only that he had stated a cause of action under *Bivens* for violations of his substantive due process rights; he did not renew his claims of violations of other constitutional rights. In support of his substantive due process claim, he relied on "a line of cases in the U.S. Supreme Court such as *Rochin v. California*, 342 U.S. 165 [(1952)], *U.S. v. Russell*, 411 U.S. 423 [(1973)], and *Hampton v. United States*, 425 U.S. 484 [(1976)], that suggest the due process clause * * * can be violated *even in the absence of a procedural violation* by law enforcement authorities who go too far in manufacturing a crime and inducing a defendant into committing it." Pet. C.A. Br. 21. He also relied on *Gunderson* v. *Schlueter*, 904 F.2d 407, 410-411 (1990), in which the Eighth Circuit suggested that an action might lie against state law enforcement officials under 42 U.S.C. 1983 if their conduct was shown to be so outrageous as to deprive the plaintiff of substantive due process. Pet. C.A. Br. 21; see also Pet. C.A. Reply Br. 8.

The court of appeals affirmed, holding that petitioner had failed to state a *Bivens* claim for violations of substantive due process. Pet. App. 1-23. The court based that holding on petitioner's failure to raise defenses of entrapment or outrageous government conduct in the criminal proceeding against him. The court observed that "[t]he alleged deprivation of [petitioner's] rights occurred during the criminal investigation and resulted in his being charged with multiple crimes." *Id.* at 9. The court reasoned that "[b]y pleading guilty, [petitioner] elected to forego the post-deprivation process best suited

to determining whether the agents in fact violated his due process rights—the criminal trial." *Ibid.*[2]

Senior Circuit Judge Heaney dissented with respect to the allegations in petitioner's complaint that did not concern IRS agents. Pet. App. 13-23. With respect to those allegations, he discerned "no special factors" that justified withholding a *Bivens* remedy. *Id.* at 13 (internal quotation marks omitted).

ARGUMENT

Petitioner renews his contention that his complaint stated a cause of action under *Bivens* for violations of substantive due process arising from alleged outrageous conduct by law enforcement officials. Pet. 8-11. The availability of a *Bivens* remedy for such conduct is not the subject of a circuit conflict or any other reported court of appeals decision of which we are aware. Moreover, the court of appeals correctly held that petitioner did not have a *Bivens* remedy in light of his failure to raise (much less prove) a defense of outrageous government conduct in the criminal proceeding against him.[3]

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[2] In the alternative, the court of appeals reasoned that the proximate cause of the injuries for which petitioner sought to recover—all of which stemmed from his imprisonment—was his decision to plead guilty and no contest to certain charges pursuant to a plea agreement, and not the alleged government misconduct that gave rise to the charges against him. Pet. App. 10. The court concluded that "[t]o the extent that the alleged outrageous government conduct was not the proximate cause of [petitioner's] injuries, his damage claim must fail as a matter of law." *Ibid.* The court also concluded that a *Bivens* remedy for the alleged misconduct by IRS agents was precluded by the availability of statutory remedies for such misconduct. *Id.* at 11-12.

[3] As an initial matter, it is doubtful that the district court had authority to adjudicate petitioner's claims. To the extent that

1. Petitioner contends that *Bivens* provides a civil remedy against law enforcement officials "who go to[o] far in manufacturing a crime and in inducing an

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petitioner was suing respondents in their individual capacities, it is not clear that the district court had personal jurisdiction over any defendant. The complaint did not identify any federal agent by name, even though, as the court of appeals noted, several agents involved in the criminal investigation of petitioner had been named in the indictment and other parts of the record of the criminal proceeding against him. See Pet. App. 5 n.2. Nor did petitioner serve the complaint upon any individual federal agent. Instead, he served only the U.S. Attorney and the Attorney General; service on them, however, would have been effective in conferring personal jurisdiction only over the United States, which was not named as a defendant. See Fed. R. Civ. P. 4(i); see also, *e.g.*, *Friedman* v. *Estate of Presser*, 929 F.2d 1151, 1155-1156 (6th Cir. 1991). It is not clear whether the defect in service was waived by the appearance of an Assistant U.S. Attorney (AUSA) in the district court. The AUSA was acting on behalf of certain individuals who asked him to represent them in the event that they were made named defendants. Only those individuals could be deemed to have waived personal service under Fed. R. Civ. P. 12(h)(1). It is purely speculative on this record whether those individuals were the same individuals encompassed by the class of unnamed defendants to which the complaint referred. The government contended in the court of appeals that, in light of petitioner's failure to name any specific officers as defendants and the vague and conclusory nature of his allegations, his action was, in reality, an action against the United States that was barred by sovereign immunity. See Gov't C.A. Br. 14-17. The court of appeals stated that petitioner's "conclusory, overbroad complaint lends considerable credence to this contention." Pet. App. 5 n.2. The court of appeals declined to rule on the contention, however, because "it was not raised in the district court." *Ibid.* However, "[s]overeign immunity is jurisdictional in nature," *FDIC* v. *Meyer*, 114 S. Ct. 996, 1000 (1994), and may be raised as a defense at any stage of the proceeding, see *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940); see also *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939).

otherwise law-abiding citizen into committing that crime." Pet. 8-9. Petitioner does not cite (and we are not aware of) any decision of this Court or another court of appeals that addresses the question.

In *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), this Court stated: "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." See also *Hampton* v. *United States*, 425 U.S. 484, 492-493 (1975) (Powell, J., concurring); cf. *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986). Several courts of appeals likewise have recognized the possible existence of a criminal defense of "outrageous government conduct." See, *e.g.*, *United States* v. *Mosley*, 965 F.2d 906, 908-909 (10th Cir. 1992); *United States* v. *Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991); *United States* v. *Robinson*, 763 F.2d 778, 785 (6th Cir. 1985); *United States* v. *Reifsteck*, 535 F.2d 1030, 1034-1035 (8th Cir. 1976); but see *United States* v. *Miller*, 891 F.2d 1265, 1271-1273 (7th Cir. 1989) (Easterbrook, J., concurring). Only two courts of appeals, however, have reversed a conviction because of "outrageous government conduct." See *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978); *Greene* v. *United States*, 454 F.2d 783 (9th Cir. 1971); cf. *United States* v. *Cuervelo*, 949 F.2d 559 (2d Cir. 1991) (remanding for further proceedings on defense of outrageous government conduct). And no court of appeals has held that such conduct supports recovery for money damages in a civil action under *Bivens* or Section 1983.

Petitioner implicitly acknowledges the absence of legal support for his *Bivens* claim when he states that "th[is] action was commenced in reliance o[n] the 8th Circuit Court of Appeals' decision in *Gunderson*." Pet.

8. *Gunderson* suggested, without holding, that relief under Section 1983 might lie for outrageous government conduct. 904 F.2d at 410-411. In the present case, the Eighth Circuit correctly characterized the *Bivens* issue before it as "unique" and resolved that issue primarily by reference to its prior decision in *Gunderson*. Pet. App. 6; see also *id.* at 8, 11. The Eighth Circuit's holding that petitioner did not meet the standard for a civil remedy suggested in *Gunderson* does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

2. In any event, and assuming arguendo that *Gunderson* provides the proper standard for *Bivens* relief here (as petitioner argues, see Pet. 9), the court of appeals correctly held that *Gunderson* does not aid petitioner.

In *Gunderson*, the plaintiff sought damages under 42 U.S.C. 1983 from a state law enforcement officer who allegedly entrapped him into conduct that gave rise to state criminal charges. 904 F.2d at 408-409. The plaintiff had been acquitted of the charges after raising, and apparently establishing, an entrapment defense at the criminal trial. *Id.* at 408, 411. The Eighth Circuit affirmed the dismissal of his Section 1983 claim. It held that he had not met the "quite high" standard of proof necessary to establish outrageous government conduct. 904 F.2d at 410. In addition, it reasoned that the plaintiff's acquittal should be "the full extent of his remedy," because "[f]inding a due process violation here would bring us too close to converting every successful entrapment defense into a section 1983 claim for damages." *Id.* at 411.

The Eighth Circuit in this case correctly concluded that petitioner "propose[d] an[] even greater conversion" than was urged by the plaintiff in *Gunderson*, because

petitioner, unlike the plaintiff in *Gunderson*, did not even raise, much less prove, defenses of entrapment or outrageous government conduct in the criminal proceeding against him. See Pet. App. 8. The court of appeals observed that allowing plaintiffs to maintain *Bivens* actions based on conduct that could have been, but was not, raised in prior criminal proceedings would "flood the federal courts with constitutional damage claims by the many criminal defendants who leave the criminal process convinced that they have been prosecuted and convicted unfairly." *Ibid.*

Petitioner offers no convincing reason why he should be allowed to maintain a *Bivens* claim despite his failure at his trial to raise the alleged government misconduct underlying the *Bivens* claim. Although petitioner asserts that "[h]e was the victim of an incompetent defense [counsel]," Pet. 6, that assertion was resolved against him in his first collateral challenge to his conviction, when both courts below rejected his claim of ineffective assistance of counsel at trial. See p. 3, *supra*.

Petitioner also suggests that the Eighth Circuit erroneously applied the doctrine of collateral estoppel against him in relying on his failure to raise a claim of outrageous government conduct in the criminal proceeding. See Pet. 10. The court of appeals, however, expressly recognized that the doctrine of collateral estoppel was inapplicable here. See Pet. App. 8-9, citing *Haring* v. *Prosise*, 462 U.S. 306, 322 n.11 (1983) (guilty plea in state criminal proceeding does not have collateral estoppel effect in later action under 42 U.S.C. 1983). Instead, the court of appeals merely held that a criminal trial is the proper forum in which to raise a claim of governmental misconduct of the sort alleged here in the first instance. See Pet. App. 9. That holding was consistent with *Gunderson*. See *Gunderson*, 904 F.2d at

411; cf. *Heck* v. *Humphrey*, 114 S. Ct. 2364, 2372 (1994) ("when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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